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In the Supreme Court of the United States

OCTOBER TERM, 1979

TEXAS LANDOWNERS RIGHTS ASSOCIATION, ET AL.,
PETITIONERS

v.

DIRECTOR, FEDERAL EMERGENCY MANAGEMENT
AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is listed in the table at 598 F. 2d 311. The opinion of the district court (Pet. App. 3a-17a) is reported at 453 F. Supp. 1025.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1979. The petition for a writ of certiorari was filed on August 11, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the procedure for the designation of flood-prone property under the National Flood Insurance Program without the requirement of a formal hearing violates due process.

2. Whether the National Flood Insurance Program, which requires local governments to adopt certain standards for new construction on land designated as flood-prone in order to permit property holders to be eligible for federally subsidized flood insurance and other assistance, impermissibly infringes upon powers that are reserved to the states under the Tenth Amendment.

STATEMENT

Petitioners brought this action for declaratory and injunctive relief challenging the constitutionality of the National Flood Insurance Program (the "Program"), 42 U.S.C. (and Supp. I) 4001-4128,[1] and the implementing regulations, 24 C.F.R. 1909.1-1925.14. Petitioners are the State of Missouri, 40 local governments, and several landowners and landowners' associations (Pet. 1).

Congress has determined that a "[u]nified national program for flood plain management" is necessary to protect the public from flood hazards. 42 U.S.C. 4001(a) and (c).[2] The first step in establishing such a program was

[1]The Program consists of the National Flood Insurance Act of 1968, enacted as Title XIII of the HUD Act of 1968; Title IV of the HUD Act of 1969; the Flood Disaster Protection Act of 1973; Section 816 of the Housing and Community Development Act of 1974; and Title VII of the Housing and Community Development Act of 1977.

[2]See also A Unified National Program for Managing Flood Losses, H.R. Doc. No. 465, 89th Cong., 2d Sess. (1966), and Senate Comm. on Banking and Currency, 89th Cong., 2d Sess., Insurance and Other Programs for Financial Assistance to Flood Victims (Comm. Print 1966).

the passage of the National Flood Insurance Act of 1968, enacted as Title XIII of the Housing and Urban Development Act of 1968. The 1968 Act made flood insurance available at actuarial rates for new construction and for substantial improvements made to existing structures. It also provided federally subsidized insurance for existing properties. As a condition of receiving these insurance benefits, the Act required flood-prone communities to adopt local flood plain management measures to reduce or avoid flood damage. In 1969 the Program was amended to make insurance available immediately at subsidized rates for all property, including new construction and substantial improvements. 42 U.S.C. 4056.

By 1973 Congress realized that the flood insurance provided under the Program was not sufficient to induce local community participation in the Program. In response, Congress passed the Flood Disaster Protection Act of 1973, which prohibited federal assistance for construction and loans from federally supervised lending institutions secured by real estate in areas that have been designated as flood-prone but whose communities are not participating in the Program. 42 U.S.C. 4106.[3]

A threshold step in the Program is the identification of flood-prone areas. The Federal Insurance Administration (FIA) has adopted the 100-year standard, designating areas that have a 1% probability of flooding in any given year. 24 C.F.R. 1909.1. FIA prepares a Flood Hazard Boundary Map (FHBM), which sets out the approximate

[3]Section 703 of the Housing and Community Development Act of 1977 removed the prohibition against financing by federally supervised institutions in flood hazard areas of non-participating communities, see 42 U.S.C. 4106, but such financing is still prohibited to landowners who live in participating communities but do not have flood insurance. 42 U.S.C. 4012a(b).

boundaries of the flood-prone area. Later, it prepares a second map (Flood Insurance Rate Map (FIRM)), which depicts the different base flood elevations within the flood hazard area. 24 C.F.R. 1914.3. New construction undertaken after the effective date of the FIRM must conform to these flood levels. 24 C.F.R. 1910.3(c). The flood levels established in the FIRM may be appealed administratively and challenged in the district court when the administrative process has been exhausted.

Petitioners challenged the constitutionality of the Program in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief (Pet. App. 3a). The district court granted respondents' motion for summary judgment, holding that the Program does not constitute a taking of property in violation of the Fifth Amendment (*id.* at 13a-15a), does not violate procedural due process (*id.* at 16a-17a) and does not infringe state powers in violation of the Tenth Amendment (*id.* at 7a-12a). The court of appeals affirmed on the basis of the district court's opinion (*id.* at 1a-2a).

ARGUMENT

1. Petitioners contend (Pet. 3, 24) that the National Flood Insurance Program constitutes a "taking" of property without just compensation in violation of the Fifth Amendment because FIA's designation of land as flood-prone reduces the value of the land. This contention is without merit. Petitioners' lands have not been seized by the government or in any way taken for public use. Moreover, not every governmental action that results in a diminution of value constitutes a "taking" of property within the meaning of the Just Compensation Clause. Indeed, even a 93% diminution in value has been held not

to be a taking. See *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915). The Program clearly is related to an important public interest, the prevention of flood damage. See 42 U.S.C. 4001. As the district court held (Pet. App. 13a-15a), the government has acted reasonably in carrying out the statutory scheme to promote the general welfare. Hence, no "taking" has occurred. See *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962); *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926).

2. Petitioners contend (Pet. 19-21) that the Program deprives them of property without procedural due process because an adjudicatory hearing is not required before the FIA designates an area as flood-prone.[4] This claim is also insubstantial. As noted above, petitioners have not been deprived of property as a result of the Program, and thus there is no need to consider the scope of their entitlement to procedural protections with respect to the governmental action affecting them. See *Board of Regents* v. *Roth*, 408 U.S. 564, 579 (1972).

Even assuming that the Program does implicate petitioners' property interests, however, it does not violate the requirements of the Due Process Clause. The procedures by which flood-prone areas are designated and flood elevations established are designed to provide full opportunity for communities and property owners to comment on, contribute to and challenge the agency determinations.

During the determination of flood elevations, the FIA requests that the community submit data, consults with local officials as the study progresses and encourages dissemination of results so that interested persons will

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[4]Petitioners do not challenge the criteria used in designating flood-prone areas (Pet. 19).

have the opportunity to comment. 24 C.F.R. 1916.1(c). When the study is completed, the proposed flood elevations are published in the Federal Register and in a local newspaper. 24 C.F.R. 1917.4. Individuals may appeal within 90 days. 24 C.F.R. 1917.5. A community may also appeal the flood elevation determination of the agency and may submit scientific data tending to contradict the data relied on by the agency. 24 C.F.R. 1917.8(a). These data are made available for public inspection and are admissible in court in the event of judicial review. 24 C.F.R. 1917.8(e). The agency may hold a hearing if it determines that the appeal "cannot be resolved by consultation with officials of the community, or by submission of the conflicting data to an independent scientific body or appropriate Federal agency for advice." 24 C.F.R. 1918.3. The final agency determination, including a decision denying a hearing, is subject to review in the district court. 42 U.S.C. 4104(f); 24 C.F.R. 1917.12.

These procedures satisfy the requirements of due process. In arguing to the contrary, petitioners rely principally on *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), which concerned the constitutionality of terminating welfare benefits without a pre-termination hearing. The requirements of due process vary depending on the situation, however (see *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976)), and this case presents a far different situation than *Goldberg*. There, the Court considered the critical need for the welfare benefits, on which many people depend for their livelihood, the educational ability of recipients to make effective written presentations, and the fact that perjury, " 'malice, vindictiveness, intolerance, prejudice, or jealousy' " often play a role in welfare termination. 397 U.S. at 268-270. In contrast, the

potentially aggrieved parties in this case are municipal governments and property owners who are able to submit effective written presentations, the rights affected are real estate values, and the subject matter is highly technical. Demeanor evidence of witnesses is not important. See 397 U.S. at 269. The existing procedures are thus appropriate for the type of quasi-legislative, technical decision-making process involved here. See *American Airlines, Inc.* v. *CAB*, 359 F. 2d 624, 633 (D.C. Cir. 1966). See also *Mackey* v. *Montrym*, No. 77-69 (June 25, 1979), slip op. 9-16; *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 334-335; *Morrissey* v. *Brewer*, 408 U.S. 471, 482-483 (1972).[5]

3. Congress has determined that there is a need for a comprehensive scheme of flood disaster management. Part of the scheme involves discouraging new investment in flood-prone areas because the public must bear the expense of the subsidized insurance. Program participation is a local community option, but Congress has

[5]Petitioners erroneously assert (Pet. 14) that respondents have admitted that the procedures violate due process requirements. Pursuant to Executive Order 12044, "Improving Government Regulations" (43 Fed. Reg. 12661 (1978)), the Department of Housing and Urban Development is reviewing, among scores of items, proposed revisions that address "in greater detail the use of administrative hearings to resolve appeals from proposed base flood elevation determinations." HUD stated that "[t]he revision may be needed to satisfy due process requirements." 44 Fed. Reg. 6678 (1979). The same information was republished on August 1, 1979 (44 Fed. Reg. 45350). The revision there was described: "*Need.* To satisfy due process requirements." These shorthand statements simply refer to the general subject matter of improving procedures for airing contrary views. They do not constitute an admission that existing procedures are unconstitutional.

Indeed, the fact that HUD is now considering changing the existing procedures suggests that review of those procedures by this Court in an action for declaratory relief is inappropriate at this time.

provided incentives for communities to participate. Petitioners contend (Pet. 25-28) that this incentive scheme violates federalism principles embodied in the Tenth Amendment.

National League of Cities v. *Usery*, 426 U.S. 833 (1976), does not imply that the Program violates constitutional principles of federalism. First, *National League* deals only with the limitation of congressional power under the commerce power and expressly does not consider limitation of federal power under the Spending Clause, Art. I, Section 8, clause 1, as involved here. 426 U.S. at 852 n.17. The power of Congress to induce state or local governmental action under the Spending Clause has repeatedly been sustained. See *North Carolina* v. *Califano*, 445 F. Supp. 532 (E.D. N.C. 1977), aff'd, 435 U.S. 962 (1978); *King* v. *Smith*, 392 U.S. 309, 333 n.34 (1968); *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 295 (1958); *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, 143-144 (1947); *Helvering* v. *Davis*, 301 U.S. 619 (1937); *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937).

Even assuming that the standards of *National League* apply to this case, the Program does not violate those standards. *National League* involved the imposition of rules on state and local governments. The states had no freedom to decide whether these rules should be implemented or not, and thus they "directly displace[d] the States' freedom to structure integral operations in areas of traditional government functions." 426 U.S. at 852. Similarly, the regulations challenged in *EPA* v. *Brown*, 431 U.S. 99 (1977), mandated the passage of regulations by the state. In contrast, the National Flood Insurance Program does not force the states to take any action. It seeks to induce local government participation in the Program by making available subsidized insurance

and by withholding other federal benefits if the community chooses not to participate. The local government retains its freedom of choice. This method of inducing local government participation by conferring or withholding federal benefits cannot be considered "coercion." *Steward Machine Co.* v. *Davis*, *supra*, 301 U.S. at 589-590.

4. Petitioners also contend (Pet. 23) that Congress lacks the power to prohibit loans by federally regulated lending institutions to landowners who refuse to take out flood insurance. Petitioners cite no authority for this erroneous contention. Congress' power under the Commerce Clause to regulate banking includes the power to prohibit banks from extending loans that are not in the public interest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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